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6 **UNITED STATES DISTRICT COURT**
7 **WESTERN DISTRICT OF WASHINGTON**
8 **AT SEATTLE**

9 BARTOLO OLIVERA RAMOS,

10 Petitioner,

Case No. C10-1226-RSM-JPD

11 v.

12 A. NEIL CLARK, Field Office Director, U.S.
13 Immigration and Customs Enforcement, *et al.*,

14 Respondents.

REPORT AND
RECOMMENDATION

15 I. INTRODUCTION AND SUMMARY CONCLUSION

16 Petitioner is a native and citizen of Mexico who is being detained by the United States
17 Immigration and Customs Enforcement (“ICE”) pursuant to an administratively final order of
18 removal. On July 30, 2010, petitioner, proceeding through counsel, filed a Petition for Writ of
19 Habeas Corpus and Complaint for Declaratory and Injunctive Relief, seeking a stay of removal
20 based on the decision in *Padilla v. Kentucky*, __ U.S. __, 130 S. Ct. 1473, 176 L. Ed. 2d 284
21 (2010)(holding that defense counsel engaged in deficient performance by failing to advise the
22 defendant of the immigration consequences of his guilty plea). (Dkt. 1.) Respondents have filed
23 a motion to dismiss, arguing that the Court lacks jurisdiction to consider petitioner’s claims
24 under the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005). (Dkt. 12.)
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1 For the reasons set forth below, the Court recommends that respondents' motion to
2 dismiss be granted, and that this matter be dismissed with prejudice.

3 II. BACKGROUND AND PROCEDURAL HISTORY

4 On December 1, 1990, petitioner was admitted to the United States at San Francisco,
5 California, as a lawful permanent resident ("LPR"). Administrative Record ("AR") at R168. On
6 January 18, 2007, petitioner pled guilty in the Superior Court of the State of Washington in and
7 for Thurston County to two counts of delivery of methamphetamine, one count of possession
8 with intent to deliver methamphetamine, and one count of unlawful possession of a firearm in the
9 first degree, and was sentenced to 36 months imprisonment. (AR R201-09.)

11 During petitioner's plea and sentencing hearing, the Superior Court Judge asked
12 petitioner: "Do you understand that if you're not a citizen of the United States, the plea of guilty
13 is grounds for deportation?" (Dkt. 13, Ex. 1 at 7.) Petitioner answered "Yes." *Id.* On the
14 Statement of Defendant on Plea of Guilty signed by petitioner, petitioner initialed a paragraph
15 stating, "If I am not a citizen of the United States, a plea of guilty to an offense punishable as a
16 crime under state laws is grounds for deportation, exclusion from admission to the United States,
17 or denial of naturalization pursuant to the laws of the United States." (Dkt. 1 at 10, ¶ (i).)
18 Petitioner also signed a paragraph stating, "My lawyer has explained to me, and we have fully
19 discussed, all of the above paragraphs." (Dkt. 1 at 13, ¶ 12.) In addition, at the plea hearing,
20 petitioner's criminal defense attorney offered the following statement:
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22 Excuse me your honor, if I may supplement the record regarding the knowing
23 waiver of my client's rights. You asked him thorough questions, but I want to
24 state that I was blessed with having Spanish-speaking co-counsel on this. . . . The
25 good news is, his family has been – it really is good news – they've been deported
26 to Mexico, where they're surrounded with support, and they're going to wait for
him to do his time and be deported himself.

(Dkt. 13 at 8: 21-25, 10:21-24.)

1 On January 24, 2007, ICE served petitioner with a Notice to Appear, charging him with
2 removability under Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (“INA”), for
3 having been convicted of an aggravated felony as defined under INA § 101(a)(43)(B), relating to
4 the illicit trafficking in a controlled substance. (AR L39-41.) On April 29, 2009, an Immigration
5 Judge (“IJ”) denied petitioner’s request for a waiver under section 212(h) and ordered him
6 removed to Mexico based on the charge contained in the Notice to Appear. (AR L159-62.)
7 Petitioner appealed the IJ’s decision to the Board of Immigration Appeals (“BIA”), which
8 dismissed the appeal on July 31, 2009, affirming the IJ’s determination that petitioner was
9 statutorily precluded from obtaining a section 212(h) waiver of inadmissibility as an alien
10 admitted as a LPR who has been convicted of an aggravated felony. (AR L248-49.) Petitioner
11 filed a petition for review of the BIA’s decision with the Ninth Circuit Court of Appeals, which
12 dismissed the petition on April 14, 2010, and the mandate issued on June 7, 2010. *See Olivera*
13 *Ramos v. Holder*, No. 09-72819 (9th Cir. 2010.)¹

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15 On July 30, 2010, petitioner, proceeding through counsel, filed the instant habeas
16 petition, alleging that “he did not receive accurate advice at the time of the entry of his guilty
17 plea.” (Dkt. 1 at 5.) He requested that this Court enter an emergency stay and enjoin
18 respondents from removing him from the United States. *Id.* at 6. The Court subsequently
19 entered a temporary stay of removal, pending briefing and a resolution of petitioner’s request for
20 stay. (Dkt. 3.) On October 7, 2010, respondents filed a motion to dismiss, arguing, *inter alia*,
21 that the Court lacks jurisdiction to review petitioner’s claims because he is only challenging his
22 final order of removal and underlying state criminal conviction. (Dkt. 12.) Pursuant to Local
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25 ¹The 90-day removal period expired on or about September 7, 2010, and the six-month
26 presumptively reasonable removal period expired on or about December 7, 2010. *See*
Zadvydas v. Davis, 533 U.S. 678, 701, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001).

1 Rule CR 7(d)(3), petitioner's response to the motion to dismiss was due on October 25, 2010.

2 On November 1, 2010, the Court granted petitioner's unopposed motion for an extension of time
3 to file a response to respondents' motion to dismiss. (Dkt. 16.) However, petitioner did not file
4 a response to the motion to dismiss. On November 26, 2010, respondents' filed a reply. (Dkt.
5 17.)

6 III. DISCUSSION

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8 Petitioner seeks "a writ of habeas corpus to prevent his unlawful removal, [and] to
9 provide an opportunity for him to have meaningful review of [his] underlying state court
10 conviction based upon *Padilla v. Kentucky*, __ U.S. __, 130 S. Ct. 1473, 176 L. Ed. 2d 284
11 (2010)," in which the Supreme Court held that defense counsel has a constitutional duty to
12 inform criminal defendants of the immigration consequences of their guilty pleas. (Dkt. 1 at 2.)
13 Petitioner avers that his former counsel provided ineffective assistance by failing to advise him
14 of the immigration consequences of his guilty plea. In support of his habeas petition, petitioner
15 asserts that he has filed a collateral attack against his criminal conviction in Thurston County
16 Superior Court, which serves as the basis for his removal from the United States. He requests a
17 stay of his final order of removal and seeks to enjoin respondents from executing his removal
18 while he challenges his criminal conviction in state court. *Id.* at 6. Because petitioner is only
19 challenging his final order of removal rather than the fact of his current detention, the Court
20 agrees with respondents that it lacks jurisdiction to grant such relief under the REAL ID Act of
21 2005. *See* INA § 242(a)(5), 8 U.S.C. § 1252(a)(5).
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24 The REAL ID Act provides that "a petition for review filed with an appropriate court of
25 appeals in accordance with this section shall be the sole and exclusive means for judicial review
26 of an order of removal entered or issued under any provision" of the Act. INA § 242(a)(5), 8

1 U.S.C. § 1252(a)(5); *see also* INA § 242(b)(9), 8 U.S.C. § 1252(b)(9) (“Judicial review of all
2 questions of law and fact, including interpretation and application of constitutional and statutory
3 provisions, arising from any action taken or proceeding brought to remove an alien from the
4 United States . . . shall be available only in judicial review of a final order under this section”);
5 INA § 242(g), 8 U.S.C. § 1252(g) (“Except as provided in this section and notwithstanding any
6 other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf
7 of any alien arising from the decision or action by the Attorney General to commence
8 proceedings, adjudicate cases, or execute removal orders against any alien under this chapter”).
9 The law specifically divested district courts of jurisdiction arising from the removal orders of
10 aliens. *See id.* Judicial review of an administratively final order of removal is only available
11 before the court of appeals having jurisdiction over the district where petitioner’s immigration
12 judge holds seat. *See* INA § 242(a)(5), 8 U.S.C. § 1252(a)(5).

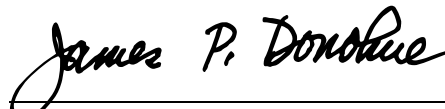
14 “A request to stay an order of removal based on a pending collateral claim does not
15 escape the jurisdiction stripping provisions of the REAL ID Act.” *Mancho v. Chertoff*, 480 F.
16 Supp. 2d 160, 162 (D.D.C. 2007) (citing *Formusoh v. Gonzales*, No. 3-07-CV-0128-K, 2007 WL
17 465305 (N.D. Tex. Feb. 12, 2007) (dismissing for lack of subject matter jurisdiction habeas
18 petition of petitioner seeking stay of removal pending resolution of an I-130 petition and an I-
19 485 adjustment of status petition)); *Tale v. United States Dep’t of Homeland Sec.*, 2006 U.S.
20 Dist. LEXIS 47577, at *1 (S.D. Tex. July 13, 2006) (finding lack of jurisdiction to grant
21 petitioner preliminary and permanent injunctions barring his deportation prior to the resolution of
22 his claims pending before an immigration judge). Absent statutory or legal authority that creates
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1 an exception to the REAL ID Act, this Court lacks subject matter jurisdiction to consider
2 petitioner's habeas challenge or to grant the relief requested.²

3 IV. CONCLUSION

4 For the foregoing reasons, the Court recommends that petitioner's petition for writ of
5 habeas corpus be denied, respondents' motion to dismiss be granted, and that this matter be
6 dismissed with prejudice. A proposed order accompanies this Report and Recommendation.

7 DATED this 12th day of January, 2011.

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9 JAMES P. DONOHUE
10 United States Magistrate Judge
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22 ²The Court also notes that it has no jurisdiction to look into the validity of petitioner's
23 plea agreement or the effectiveness of his defense counsel. Rather, such claims must be raised
24 in an application for post-conviction relief filed with the appropriate federal or state court. *See*
25 *Padilla*, 130 S. Ct. at 1473. "The availability of post-conviction motions or other forms of
26 collateral attack does not affect the finality of the conviction for immigration purposes, unless
or until the conviction has been overturned pursuant to such a motion." *Matter of Ponce De*
Leon, 21 I&N Dec. 154, 157 (BIA 1997). Should petitioner show that his conviction has been
vacated pursuant to *Padilla* or some other basis, he may seek *sua sponte* reopening of his
removal proceedings before the BIA. *See* 8 C.F.R. § 1003.2(a).